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NO. 444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

CITY OF ERLANGER, KENTUCKY,
Petitioner,

v.

RAYMOND J. BERKEMEYER,
THE WEIL, ROTH & IRVING COMPANY,
JOHN D. EXTERKAMP,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and Brief in Support Thereof

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October 27, 1953.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER

1. Raymond J. Berkemeyer (hereinafter Berkemeyer sought a judgment against Erlanger on certain United States District Court for the Eastern District of Kentucky against Petitioner, the City of Erlanger, Kentucky, (hereinafter Erlanger). Tr. 1. Berkemeyer) (respondent herein) brought this action in the

sewer revenue bonds and the appointment of a receiver to operate Erlanger's sewer system and apply the revenues therefrom to payment of the bonds. Tr. 6-7.

2. Through an Amended Complaint The Weil, Roth and Irving Company (hereinafter Weil-Roth) (respondent herein) became a party plaintiff, stating that Berkemeyer was merely the nominal owner of the bonds for the purpose of the action and that Weil-Roth was the beneficial owner thereof. Tr. 28, 32.

3. John D. Exterkamp (hereinafter Exterkamp), one of respondents herein, intervened in the action, alleging that he was the owner of five of the bonds and praying for judgment against Erlanger. Tr. 44-51.

4. In its Answers to the Amended Complaint and an Amended Intervening Petition, Erlanger asserted its defense that bonds had been delivered and put into circulation unlawfully, illegally and without Erlanger's authority and were therefore wholly void. Tr. 36-38, 51-52.

5. The trial was by the Court without a jury. Tr. 61. Erlanger contended that the bonds were wholly void because Erlanger (a) never authorized their delivery, and (b) never received any consideration whatsoever for their issuance.

6. The bonds, by their terms, were payable exclusively out of the revenue to be derived from the operation of Erlanger's sanitary sewer system (P. Ex. 1, Tr. 79, 263), and under the Negotiable Instruments Law of Kentucky were non-negotiable instruments because they were not unconditional promises to pay

within the provisions of that law (Carroll's Ky. Stats. (1936) §§3720b-1, 3720b-3) (App., pp. 27-28, *infra*). Hence, under Kentucky decisions, the provisions of the Negotiable Instruments Law had no application to the bonds. The bonds were authorized under a Kentucky statute (Carroll's Ky. Stats. (1936) §2741L) (App., pp. 27-28, *infra*) which assigned to those bonds when in the hands of bona fide holders "all the qualities of negotiable instruments *under the law merchant.*"*

7. Under Kentucky law the legislative body of Erlanger, a city of the sixth class, was required to keep a record of its proceedings (Carroll's Ky. Stats. (1936) §3698), and Erlanger could speak only through and be bound only by that record (Tr. 499). The bonds could have been validly delivered and put in circulation only through authority granted by Erlanger's legislative body. Carroll's Ky. Stats. (1936) §2741L-5. The records of Erlanger's legislative body show conclusively that delivery of the bonds sued on was never authorized by that body. Tr. 98-99.

8. Despite the fact that Erlanger's records conclusively showed that Erlanger had *not* authorized delivery of the bonds sued on, the District Court (a) found that Erlanger had authorized delivery of the bonds (Tr. 469, 476-77), (b) entered judgment in favor of Exterkamp (Tr. 472) and of Weil-Roth (Tr. 482), and (c) appointed a receiver to take exclusive control of, manage and operate Erlanger's sewer system (Tr. 485-488).

*Emphasis supplied here and elsewhere in Petition and Brief, unless otherwise indicated.

9. On appeal by Erlanger to the United States Court of Appeals for the Sixth Circuit (Tr. 488), that Court held (a) that the bonds were not negotiable instruments under the Negotiable Instruments Law of Kentucky; (b) that the City had never authorized delivery of the bonds sued on; and (c) that while the bonds were not negotiable instruments under the Negotiable Instrument Law, neverthless, under Section 16 of that law (KRS 356.016) (App., p. 29, *infra*) non-delivery was no defense because valid delivery was conclusively presumed, despite the provisions of the statute under which the bonds were authorized declaring that they should have the qualities of negotiable instruments under the Law Merchant when in the hands of a bona fide holder (Tr. 500-506). On the basis of those holdings, the Court of Appeals (a) affirmed the judgment of the District Court (with certain modifications not important here), and (b) remanded the cause for further proceedings in connection with the receivership. Tr. 508.

10. Erlanger filed its Petition for Rehearing (a) asserting (i) that the provisions of the law merchant and not those of the NIL must be applied to determine the validity of the bonds, and particularly the availability of the defense of non-delivery, and, (ii) that under the Law Merchant the bonds sued on were wholly void because they were never delivered by Erlanger; and (b) requesting that the Court of Appeals stay further proceedings in the federal courts until an authoritative state court decision could be obtained as

to the application and effect of the law merchant in respect of the bonds sued on. Tr. 509-550.

11. Shortly after Erlanger filed its Petition for Rehearing, Weil-Roth, despite the fact that the decision of the Court of Appeals was in its favor, petitioned for a rehearing, asking the Court of Appeals to find that Erlanger had in fact actually authorized delivery of the bonds. Tr. 554-560.

12. The Court of Appeals denied both Petitions for Rehearing (Tr. 563).

II.

JURISDICTIONAL STATEMENT

The statutory provision believed to sustain the jurisdiction of this Court is §1254 (1) of Title 28 of the United States Code. The Court of Appeals denied Erlanger's Petition for Rehearing on September 15, 1953, (Tr. 563), and the date of the Petition for Certiorari is October 27, 1953.

III.

QUESTIONS PRESENTED

1. Under the Negotiable Instruments Law adopted by Kentucky in 1904 (1904 Acts ch. 102), Erlanger's sewer revenue bonds were *not* negotiable instruments, because, being payable only from a designated fund, they were not unconditional promises to pay (Carroll's Ky. Stats. (1936) §§3720b-1 and 3720b-3) (App.,

pp. 28-29, *infra*). In 1926 (twenty-two years after Kentucky adopted the NIL, Kentucky's legislature authorized the issuance of municipal sewer revenue bonds such as those sued on, but provided specifically that in the hands of bona fide holders such bonds would have "all the qualities of negotiable instruments *under the law merchant*." Are the rights of a holder of Erlanger's sewer revenue bonds governed by (a) the Negotiable Instruments Law or (b) the Law Merchant, under which the bonds are wholly void?

2. The Court of Appeals for the Sixth Circuit was called upon to determine (a) the validity of certain Kentucky municipal revenue bonds, and (b) the necessity for appointing a receiver to take over, manage and operate all the sanitary sewer system properties of a substantial Kentucky municipality. The validity of the bonds and the necessity for the appointment of a receiver turned upon an important question of Kentucky public law never decided by any Kentucky Court. Should not the Court of Appeals have stayed further proceedings in the federal courts until an authoritative decision could be obtained from Kentucky's highest court on the crucial question of Kentucky law?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. By (a) applying to Kentucky sewer revenue bonds a Kentucky statute (NIL) which Kentucky's highest court had determined does *not* apply to revenue bonds, and (b) refusing to apply to such bonds the Kentucky statute specifically applicable to them, the Court of Appeals for the Sixth Circuit decided an important question of Kentucky public law in flagrant disregard of the specific provisions of that law.

2. The case involves an important problem in federal procedure: Under what circumstances should federal court proceedings be stayed to permit the parties to secure an authoritative determination of state law? The decision of this case involves (a) the possession, management and operation of all the sanitary sewer system properties of a substantial Kentucky municipality, and (b) a liability of all the users of those sanitary sewer system properties; and turns on a question of Kentucky law never decided by Kentucky's courts. Necessarily, the litigation presents a delicate question in the relations between the federal courts and the state. This Court should review the decision below, both to decide this case correctly and to assist the lower federal courts in dealing with this unsettled and troublesome question of federal procedure.

WHEREFORE, your petitioner prays (1) that a writ of certiorari issue under the seal of this Court,

directed to the United States Court of Appeals for the Sixth Circuit, commanding said court to certify and forward to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 11656, City of Erlanger, Appellant, v. Berkemeyer, *et al,* Appellees, so that this cause may be reviewed and determined by this Court; (2) that the judgment of said Court of Appeals be reversed by this Court; and (3) for such other relief as to this Court may seem proper.

CHAS. I. DAWSON,
Attorney for Petitioner,
City of Erlanger.

RUCKER TODD,
ERVIN L. BRAMLAGE,
RALPH P. RICH,
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Brief in Support of Petition for Writ of Certiorari

I.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (Tr. 497-508) is reported in 204 F. 2d 567.

II.

JURISDICTION

1. The statutory provision believed to sustain the jurisdiction of this Court is 28 U.S.C. §1254(1).

2. The Court of Appeals denied Erlanger's Petition for Rehearing on September 15, 1953. Tr. 563.

III.

STATEMENT OF THE CASE

1. Under the authority of a Kentucky statute (Carroll's Ky. Stats. (1936) §2741L) (App., pp. 27-28, *infra*) the Town of Erlanger, Kentucky, on March 5, 1936, through its Board of Trustees (Town Council), by ordinance authorized the preparation and the execution, but not the sale or delivery, of an issue of sewer revenue bonds to be paid exclusively from the revenue to be derived from the operation of the sewer system. D. Ex. 1, Tr. 95-96, 382-83; P. Ex. 14, Tr. 154-155, 231-32, 295-310. The statute under which Erlanger proceeded in respect of the authorization of the bonds provided that the bonds shall have "in the hands of bona fide holders all of the qualities of negotiable instruments *under the law merchant.*" Carroll's Ky. Stats. (1936) §2741L-5 (App., pp. 27-28, *infra*).

2. The bonds were printed and signed. Tr. 163-64.

3. On June 4, 1936, without any authority so to do, Erlanger's City Attorney (a) fabricated and certified (i) a resolution authorizing delivery of all the bonds ($150,000) to Hector Coolsaet, a contractor, and (ii) minutes of a meeting of Erlanger's Board of Trustees purporting to show adoption of the false and fabricated resolution; (b) swore to and signed a false affidavit stating that the false and fabricated resolution had been properly posted; and (c) prepared and secured execution of a receipt falsely stating that Coolsaet had received all the bonds ($150,000). With-

out any authority so to do, the City Attorney did give Coolsaet some twenty-five of the $1000 bonds. P. Ex. 14, Tr. 154-155, 231-32, 322-329; Tr. 214, 223-225, 227.

4. As shown (a) by Erlanger's minutes [all of which were available (Tr. 451), in chronological order (Tr. 451), on consecutively numbered pages (Tr. 451)], and (b) by Erlanger's mayor, neither the false and fabricated resolution, nor any other resolution authorizing delivery of all or any part of the bonds to Coolsaet was ever introduced or passed in Erlanger's legislative body. Tr. 98-99, 163-164.

5. Peck, Shaffer and Williams, a Cincinnati law firm, addressed to Coolsaet an opinion letter dated June 5, 1936, stating that the sewer revenue "bonds and interest coupons are valid and binding special obligations of the Town of Erlanger, Kentucky." P. Ex. 15, Tr. 153-154, 335-36. The false and fabricated resolution, minutes, affidavit and receipt were introduced at the trial in this cause through Mr. Frank H. Shaffer, Jr. of Peck, Shaffer and Williams in connection with his firm's June 5, 1936, opinion letter (Tr. 152-156), although (a) the June 5, 1936, opinion letter did not refer specifically to the false and fabricated resolution, minutes, affidavit or receipt, (b) the record does not disclose when Peck, Shaffer and Williams received the false and fabricated resolution, minutes, affidavit and receipt (Tr. 152-156, 228-230), and (c) the City Attorney was not the proper official to certify Erlanger's resolutions or minutes (Carroll's Ky. Stats. (1936) §§3684 and 1629).

6. Beginning in June, 1936, with the delivery of some twenty-five bonds to Coolsaet, Erlanger's City Attorney, acting wholly without authority, delivered sewer revenue bonds to various persons. For those bonds, the delivery of which Erlanger had *not* authorized, Erlanger received not one iota of consideration. Tr. 109, 213.

7. Five of the sewer revenue bonds handed to Coolsaet by the City Attorney were delivered by Coolsaet to John G. Exterkamp in about 1936 in payment of a private debt, the amount of which is not shown in the record. Tr. 91, 166, 246-247.

8. In 1936 and early 1937 the City Attorney, acting wholly without authority, handed some twenty-two of the $1000 bonds to Theodore Zumstein and D. W. Smith. Tr. 213, 216. Zumstein and Smith (a) during December, 1936, and February, 1937, pledged seven of the bonds to the Fort Thomas Bank, Fort Thomas, Ky., as security for personal loans (P. Ex. 5, Tr. 136-37, 266-67; 212-213), and (b) on April 22, 1937, sold two of the bonds to the Fort Thomas Bank (P. Ex. 6, Tr. 139-140, 268-269).

9. Erlanger paid for its sanitary sewer system without using the bonds or any proceeds thereof. It paid for the sewer system (a) in part from the proceeds of a general bond issue of $40,000, payable out of tax revenues and voted by the people of Erlanger (Tr. 107), (b) in part by an assessment of $33,015.92 against the users of the sewer system (Tr. 110), (c) in part

from borrowed funds (Tr. 107), and (d) in part with money donated by WPA and PWA (Tr. 107, 108).

10. In 1942 the five bonds delivered by Coolseat to John G. Exterkamp in about 1936 passed by inheritance to John D. Exterkamp. Tr. 87.

11. In 1945 The Weil, Roth & Irving Company, a Cincinnati, Ohio, municipal bond house (Tr. 76), bought the nine bonds from the Ft. Thomas Bank (Tr. 81, 159), although (a) four of those bonds had then matured (Tr. 77-79, 82), (b) all those bonds bore unpaid interest coupons dating back to 1937 (Tr. 83), and (c) Weil-Roth knew that Erlanger had disclaimed liability on the bonds (Tr. 84).

12. Five years later, in 1950, Raymond J. Berkemeyer (represented by Mr. Frank H. Shaffer, Jr. and Peck, Shaffer and Williams) brought suit against Erlanger in the United States District Court for the Eastern District of Kentucky on the bonds which Weil-Roth had bought from the Ft. Thomas Bank. Tr. 1-7. Thereafter, in a verified Amended Complaint, Weil-Roth (represented by Mr. Frank H. Shaffer, Jr. and Peck, Shaffer and Williams) appeared as a party, acknowledging that Berkemeyer was a "nominal holder" of the bonds "for the purpose of this suit" but alleging that Weil-Roth had purchased the bonds "in good faith for value.*" Tr. 29-36. On September 25, 1950, John D. Exterkamp intervened in the action Tr. 44-47.

*Despite this allegation, the District Court excluded evidence to show that Weil-Roth had paid but $1 for each of its nine $1000 bonds. Tr. 161.

13. Although the District Court [which heard the case without a jury (Tr. 61)] recognized that under Kentucky law a municipality can speak only through its records and that the minutes of the Erlanger legislative body were all available on consecutively numbered pages (Tr. 448-452), the District Court nevertheless concluded that the false and fabricated resolution and minutes established Erlanger's authorization of delivery of the bonds! Tr. 442-445.

14. On March 26, 1952, the District Court (a) as to Weil-Roth entered (i) Findings of Fact (Tr. 472-480), (ii) Conclusions of Law (Tr. 480-482), and (iii) a Judgment, to be paid from the sewer system revenues, in favor of Weil-Roth for the $1000 face amount of each matured bond and the $30 face amount of each due coupon together with 6% interest from each coupon's due date (Tr. 482-484); (b) as to Exterkamp, entered (i) Findings of Fact and Law (Tr. 466-471), and (ii) a Judgment, to be paid from sewer system revenues, in favor of Exterkamp for the $30 face amount of each due coupon together with 6% interest from each coupon's due date (Tr. 472); and (c) appointed a receiver to take over, manage and operate Erlanger's sanitary sewer system properties (Tr. 485-488).

15. From those Judgments of the District Court, Erlanger appealed to the United States Court of Appeals for the Sixth Circuit. Tr. 488.

16. The Court of Appeals in its May 11, 1953, Opinion (Tr. 497-508) (a) agreed that Weil-Roth and

Exterkamp had failed to prove an authorized delivery of the bonds by Erlanger, because Erlanger could speak only through and be bound only by its records, and (b) conceded that under the express provisions of the NIL the bonds were not negotiable instruments within that law. Nevertheless, the Court of Appeals held that, since Weil-Roth and Exterkamp had the rights of bona fide holders, NIL §16 (KRS 356.016) (App., p. 29, *infra*) applied a conclusive presumption that the bonds had been validly delivered by Erlanger. So far as the Court of Appeals Opinion discloses, the Court gave no consideration at all to the facts (a) that the statute under which the bonds were authorized provides *specifically* that they shall have "in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant", not* the qualities of negotiable instruments under the Negotiable Instrument Law, and (b) that under the Law Merchant an instrument never delivered by its maker is wholly void, even in the hands of a bona fide holder.

17. On July 22, 1953, Erlanger filed its Petition for Rehearing (Tr. 509-550) in which it (a) asked that the Opinion be withdrawn and demonstrated (i) that rights under the bonds were governed by the Law Merchant, and (ii) that under the Law Merchant an originally undelivered instrument was wholly void, even in the hands of a bona fide holder; and (b) asked that the Court of Appeals remand the case to the District Court with instructions to stay further proceedings until an authoritative decision could be secured

from Kentucky's highest court on the proper application of the Law Merchant to rights under the bonds.

18. On July 31, 1953, nine days after Erlanger's Petition for Rehearing was filed, Weil-Roth filed a Petition for Rehearing (Tr. 554-560) asking the Court of Appeals to find that the false and fabricated resolution and minutes did establish a valid delivery of the bonds by Erlanger.

19. Apparently through an editorial mistake by West Publishing Company the May 11, 1953, Opinion of the Court of Appeals was inadvertently published in the Federal Reporter (Second Series) Advance Sheet dated August 3, 1953, (204 F. 2d 567).

20. On September 15, 1953, the Court of Appeals entered an Order denying Erlanger's Petition for Rehearing and Weil-Roth's Petition for Rehearing. The Order stated simply that the Petitions were denied, citing only "*Wettlaufer* v. *Baxter,* 137 Ky. 362, 367-368; *Young* v. *Exchange Bank of Ky.,* 152 Ky. 293, 302; *Gannon* v. *Bronston,* 246 Ky. 612, 620, 625." Tr. 563.

IV.

SPECIFICATIONS OF ERROR

1. The United States Court of Appeals for the Sixth Circuit committed error in holding that §16 of the Negotiable Instruments Law denied Erlanger the benefit of the defense of original non-delivery, despite the facts that (a) the bonds sued on were not negotiable instruments under the Kentucky Negotiable Instruments Law, (b) the Court of Appeals of Kentucky has held her Negotiable Instruments Law does not apply to instruments made non-negotiable under its provisions, and (c) the Kentucky statute under which the bonds were issued expressly provides that the qualities of those bonds shall be determined by the Law Merchant, under which original non-delivery is a complete defense.

2. The United States Court of Appeals for the Sixth Circuit committed error in failing and refusing to remand the case to the District Court with instructions to stay all further proceedings therein until an authoritative decision could be obtained from Kentucky's highest court on the question involved, which is peculiarly and exclusively one of state law and of state public policy.

V.

THE ARGUMENT

A.

By (a) applying to the bonds sued on a statute (NIL) which Kentucky's highest Court has determined does *not* apply to such bonds, and (b) refusing to apply to those bonds a statute specifically applicable to them, the Court of Appeals decided an important question of Kentucky public law in flagrant disregard of the specific provisions of that law.

(a) The question is important.

Two factors show the importance of the question which the Court of Appeals decided in flagrant disregard of Kentucky law:

First, there is the fact that the statutory provision involved in this case applies not only to the bonds here involved but as well to many other types of revenue bonds. Time and again, in separate statutes, Kentucky's legislature has expressly declared, through the same language that applies to Erlanger's sewer revenue bonds, that revenue bonds shall "have in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant.*" And this, notwithstanding the fact that at the date of enactment of each of those statutes, as well as at the date of enactment of the statute authorizing the issuance of the bonds sued on, the NIL had long been on the statute books of the state.

For example: (a) public building revenue bonds (Carroll's Ky. Stats. (1936) §4535 m-4); (b) recreation

project revenue bonds (Carroll's Ky. Stats. (1936) §2741p-18 (1940 Supp.)); (c) water district revenue bonds (Carroll's Ky. Stats. (1936) §938g-30); (d) electric light, heat and power plant revenue bonds (Carroll's Ky. Stats. (1936) §3480d-5); (e) law school building revenue bonds (Carroll's Ky. Stats. (1936) §2948c-5 (1939 Supp.)); and (f) sanitary district revenue bonds (Carroll's Ky. Stats. (1936) §2062g-41 (1940 Supp.)). See Tr. 521-524.

Thus, the statutory provision making the Law Merchant—not the NIL—govern rights under public revenue bonds is an established part of Kentucky public policy, making available to the governmental agency issuing each such bond the defense of original nondelivery. The decision in this case will doubtless affect many other issues of revenue bonds and flout the public policy of Kentucky declared in repeated legislative enactments.

In the second place, the decision in this case is important because of its impact in this case itself. If the decision of the Court of Appeals is permitted to stand, an onerous liability is fastened upon the sewer users of Erlanger who will have to pay twice for their sewer system and see their sewer system taken over and operated and managed by a receiver from the federal courts.

(b) The decision below is demonstrably wrong.

Our position in the Petition for Rehearing before the Court of Appeals, and here, is simple and direct:

1. The NIL could not apply to Erlanger's sewer revenue bonds of its own force because, being revenue bonds, they were not unconditional promises to pay and accordingly were not negotiable instruments under the NIL;

2. The Kentucky statute which authorized the sewer revenue bonds specifically made the Law Merchant govern rights under the bonds, instead of the NIL;

3. Under the Law Merchant a negotiable instrument never delivered by its maker is *wholly void;* and

4. Therefore the bonds were *wholly void,* for they were never delivered by Erlanger.

The Court of Appeals had agreed that the bonds could not qualify as negotiable instruments under the NIL because they were not unconditional promises to pay. Tr. 500. And the Court of Appeals had correctly recognized that the bonds were governed by the statutory provision that they should "have in the hands of bona fide holders all the qualities of negotiable instruments *under the law merchant.*" Tr. 501.

However, without any discussion of (a) possible differences between the Law Merchant and the NIL, or (b) the possibility that Kentucky's legislature meant "Law Merchant" when it said "Law Merchant," the Court of Appeals had proceeded to apply the NIL to Erlanger's sewer revenue bonds. Tr. 505-506. The bitter truth seems to be that the Court of Appeals failed to perceive the crucial significance of the term "Law Merchant" because it failed to perceive that there was

a radical difference between the provisions of the Law Merchant and the NIL as to an instrument never delivered by its maker.

Thus Erlanger's Petition for Rehearing brought before the Court of Appeals the all-important considerations which the Court of Appeals had evidently not previously perceived.

We state candidly that we do not know upon what grounds the Court of Appeals denied the Petition for Rehearing. In the Order denying Erlanger's Petition for Rehearing, the Court cited three Kentucky cases, indicating in each citation the pages thought relevant to the denial. Tr. 563. The most than can be gleaned from those citations is that Kentucky's highest Court has said several times that the Negotiable Instruments Law is "with few exceptions" merely a "codification" (137 Ky. at 367) (246 Ky. at 625) and that the NIL was not prepared "with a view of making any radical changes" (137 Ky. at 367) or "to depart from any settled and sound principles of commercial law" (152 Ky. at 303).

Possibly the Court of Appeals was trying to say that when Kentucky's legislature said "Law Merchant" it meant "Negotiable Instruments Law." Or perhaps it was trying to say that the rule of the Law Merchant with regard to undelivered instruments was the same as Section 16 of the Negotiable Instruments Law. Whichever it was trying to say, the Court of Appeals was patently wrong.

In our Petition for Rehearing, we demonstrated that on any proper construction of the governing stat-

ute, the Law Merchant—not the NIL—applies to the bonds. That demonstration is set forth at pages 518-524 of the Transcript and need not be repeated here.

Similarly, in Erlanger's Petition for Rehearing, we carefully examined and analyzed the pre-NIL decisions dealing with originally undelivered instruments and showed that before the NIL an instrument never delivered by its maker was wholly void. Tr. 528-544. We concluded our argument by showing that Dean James Barr Ames had regarded NIL §16 as working a "startling" change in the law. Here we shall add but a single authority. In 1904, the year in which Kentucky adopted the NIL, Charles M. Lindsay of the Louisville bar prepared a small treatise entitled "The Negotiable Instruments Law of Kentucky." At page 14, Mr. Lindsay had this to say of NIL § 16:

> "Thus, one who has signed a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from someone else after his death. *This provision has radically changed the law.*"

So we say to this Court that the Court of Appeals decision is wrong—and demonstrably wrong; that the question of state law is an important one; and that this Court should grant a writ of certiorari to review the decision.

This Court's potential power of review is the ultimate assurance that every question will receive full

and fair consideration by the lower federal courts. Unwise it would be for this Court in the press of its certiorari business to ignore its essential function of requiring that the lower federal courts treat each contention fairly, even if fairness leads to embarrassment.

B.

The case involves the important question in federal procedure of whether the Court of Appeals should have stayed further proceedings in the federal courts until an authoritative decision could be obtained in the state courts, thereby avoiding possible unseemly federal-state divergences.

In its Petition for Rehearing, Erlanger requested the Court of Appeals to remand the case to the District Court, directing that further proceedings in the federal courts be stayed until an authoritative decision could be obtained from Kentucky's highest court on the proper application of the Law Merchant to the bonds. Tr. 546-549. The Court of Appeals ignored that suggestion in denying Erlanger's Petition for Rehearing. Tr. 563.

As frequently suggested [*e. g.*, Note, *The Pullman Case: A Limitation on the Business of the Federal Courts,* 54 Harv. L. Rev. 1379 (1941)], the federal courts should work out arrangements under which matters primarily of state concern can be determined by the state courts. One excellent device is to stay federal court proceedings until a decision can be obtained in the state courts determining the proper construction of a state statute.

We shall not now attempt to interpret for this Court this Court's own decisions dealing with that device. A number of them are cited and discussed in Erlanger's Petition for Rehearing (Tr. 547-548). But we shall show that this case is an appropriate one for the use of that device.

The case necessarily involves a conflict between the federal courts and one of Kentucky's political subdivisions. The federal courts are called upon to decide an important question of Kentucky's public law, one which has never been decided by the Kentucky courts. Under the decisions below a receiver appointed by the federal courts will take over, manage and operate all of Erlanger's sanitary sewer system properties. The receiver appointed by the federal courts will collect from Erlanger's inhabitants sewer rentals to pay a liability on bonds for which Erlanger and its citizens never received one jot or title of consideration. They will have to pay that liability because the federal courts have denied them a defense expressly given them by Kentucky's legislature.

The case is in the federal courts only because of diversity of citizenship. If in state court litigation involving other bond issues it were determined—as we confidently assert it would be—that originally undelivered revenue bonds such as Erlanger's sewer revenue bonds are wholly invalid, there would indeed be an unseemly divergence between the state and federal courts. The federal courts would suffer unnecessarily from a self-inflicted wound.

The federal courts should be astute to avoid such unseemly federal-state divergences and self-inflicted wounds. Yet certainly not in every case that presents a tough state law question should the federal courts stay proceedings. Against the gravity of the conflicts, divergences and wounds must be weighed the delay and expense to the litigants. A difficult task. And this Court has given the lower federal courts but little help in the execution of the task.

We submit that this Court should grant a writ of certiorari to determine upon the facts of this case that federal court proceedings should be stayed until an authoritative state decision can be secured. Only by thus pricking out from case to case the boundaries of the area within which the federal courts should defer to the state courts can this Court discharge its important function of leading the lower federal courts through the difficult maze of state and federal relations.

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